No. ~~371.~~ 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

GAYNOR NEWS COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

The Petitioner seeks a review under 28 U. S. C. 1254 (1) of a decree of the Circuit Court of Appeals for the Second Circuit, entered on July 8, 1952 (R. 129-132), enforcing an Order issued by the National Labor Relations Board against Gaynor News Company, Inc. (R. 7-12). Petition for Certiorari was filed on October 2, 1952 and Certiorari was granted on March 9, 1953.

Opinions Below.

The opinions of the Circuit Court of Appeals for the Second Circuit were filed on June 24, 1952 (R. 121-128), and are reported at 197 F. 2d 719. Findings of fact, conclusions of law and order of the National Relations Board (R. 7-44) are reported at 93 NLRB 299.

Jurisdiction.

The jurisdiction of this Court is invoked under Title 28 U. S. C. 1254 (1).

The particular facts in this case also place it within the purview of Supreme Court Rule 38, Paragraph 5 (b), which recognizes the jurisdiction of this Court to accept cases in which a Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals on the same matter.

Statute Involved.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V. 151, *et seq.*), are set forth in the Appendix, *infra,* pages 1a-3a.

Questions Presented.

1. Can an employer be held guilty of an unfair labor practice under Section 8 (a) (3) of the Labor-Management Relations Act of 1947, which provides that he may not encourage or discourage membership in any labor organization by discrimination in regard to any terms or conditions of employment, where there is no evidence that the acts complained of actually encouraged or discouraged such membership, or that that was their purpose?

2. May the Board "amend" original charges, so as to add new parties and new substantive allegations which were not included in the original charge long after the six months statute of limitations period provided in § 10(b) of the Act has expired?

3. Can the National Labor Relations Board void an entire contract which contains a union security clause later found to be illegal, in spite of the fact that the contract contains savings and separability clauses which attempt to provide for precisely that type of situation?

Statement of the Case.

There is little dispute as to the underlying facts in this case. Gaynor News Company, Inc., (hereinafter referred to as Petitioner) is engaged in the wholesale distribution and delivery of newspapers and periodicals. In 1946 it concluded a valid closed shop agreement with the Newspaper and Mail Deliverers' Union of New York and Vicinity, (hereinafter referred to as the "Union"), restricting employment in Petitioner's business to members of the Union. However, employment of non-Union employees was permitted pending such time as the Union could supply Union employees. This Union was, for all practical purposes, a closed Union and did not accept new members except for first-born legitimate sons of Union members. The non-Union employees, whose rights and status are here involved, did not have tenure in that they could be validly discharged any time the Union supplied members to replace them. Obviously, they were not covered by the closed shop contract, since, as with every closed shop contract, it was applicable to Union members only.

The specific charge in this matter was brought by a single non-Union employee, (hereinafter referred to as "Loner"), to the effect that Petitioner was guilty of encouraging Loner's membership in the Union by its failure to pay him a certain amount of retroactive pay received by Petitioner's permanent Union personnel under its con-

tract and a vacation benefit which Petitioner voluntarily granted its regular employees.[1] A complaint issued on the basis of the charge in February 1949 and an "amended" complaint issued in June 1950, which raised, for the first time, the question of the invalidity of the 1948 contract, and which also raised, for the first time, the charge that the employer had similarly discriminated against many other persons not named. A hearing was held before a Trial Examiner on July 17-19, 1950 who found that Petitioner had committed the unfair labor practice specified in the charge and recommended that an Order issue extending the benefits claimed, not only to Loner, but to all non-Union employees similarly situated. The National Labor Relations Board issued its Order, as recommended, and the case was taken to the United States Court of Appeals for the Second Circuit on Petition for Enforcement. That Court modified the Order of the National Labor Relations Board insofar as it forbade the Union to continue to enjoy representative status and conduct negotiations on behalf of its employee members. The remainder of the Order was directed to be enforced as made.

Admittedly, neither the charge nor the complaint is supported by *any* evidence that Petitioner had the slightest interest or motive with respect to Loner's affiliation or non-affiliation with the Union. Petitioner offered to show that Loner had long since applied for membership in the Union, had been denied such membership, and was, in fact, ineligible for such membership, but this testimony was barred (R. 105-109, 118-120). Petitioner also sought to show that Loner first obtained employment with Gaynor

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[1] "Voluntarily" in the sense that it was not required by the collective bargaining agreement. In granting such a gratuitous benefit, the employer weighed the cost in terms of maintaining harmonious labor relations with its permanent personnel.

News Co., Inc. through the efforts of the Union's business agent and that evidence was also barred (R. 109). The Board and the Circuit Court of Appeals for the Second Circuit held that the purpose and effect of Petitioner's actions were immaterial and that it was guilty of unfair labor practices on the ground that the conduct here involved was "inherently conducive" or had a "natural tendency" toward increasing Union membership.

Petitioner's position is that, since it was not contractually bound to pay extra benefits to its relatively temporary non-Union employees, in its business judgment, it did not do so. The factors influencing its choice clearly had no relation to any inclination on Petitioner's part to see Loner become a member of the Union, nor to the possibility that such membership would occur. On the contrary, under the peculiar circumstances in this case, Petitioner would have been much more interested in keeping its temporary non-Union personnel in *statu quo,* since they would thereby continue to be contractually ineligible for extra benefits.

It is important to distinguish between the 1946 contract, the validity of which is not in dispute, and the 1948 contract which the Board seeks to set aside at this late date. The 1946 contract obviously did not cover non-Union employees since it was a closed shop contract. The contract entered into on October 25, 1948 raised a question of doubt as to that issue. Assuming, *arguendo,* that the latter contract did cover non-Union employees, it would appear that at most Petitioner was guilty of a breach of contract with its non-Union employees. However, Petitioner stands here accused, not of a breach of contract, but of an unfair labor practice. The allegedly aggrieved employees have an ample remedy at law for whatever

damages they may have suffered, as a result of any breach of contract. Certainly, it has never been suggested that the National Labor Relations Board is the proper forum in which to try breach of contract actions. An unfair labor practice finding results in severe penalties being imposed upon an employer in his future relationship with the collective bargaining representatives. It carries with it innuendoes and implications of a far-reaching nature having nothing to do with a sincere misunderstanding of contractual terms. Where similar circumstances created doubts as to the coverage afforded non-Union employees by a collective bargaining agreement, the aggrieved employees brought suit in the New York Supreme Court and the matter was finally determined in their favor, at which time the judgment rendered against the employer was paid in full. *Newspaper & Mail Deliverers' Union of New York and Vicinity* v. *Newark News Dealers Supply Co., Inc.* 303 N. Y. 860 (1951). This is not the case of an employer seeking to evade responsibility for his conduct. This is a case in which the employer is charged with "encouraging" Union membership in a Union with which it has had a prolonged and controversial relationship.

It is not questioned that the the Union and Petitioner are, and always have been, at "arms length" in the most traditional employer-union sense. The bitterness of the protracted negotiations preceding both the 1946 and 1948 contracts is undisputed and not controverted (R. 112- 113). Thus, the contention by the Board that Petitioner is guilty of assisting and encouraging membership in a Union to which it has always been bitterly opposed is anomalous. The decisions of the Board and the United States Court of Appeals for the Second Circuit find Petitioner guilty of encouraging membership in a Union it strongly opposes and which clearly would not accept the membership al-

legedly sought to be encouraged. This just does not make any sense. After all, in the field of labor relations one is supposed to be realistic.

Summary of Argument.

Petitioner contends that the Board has failed to prove, under the circumstances of this case, that the purpose and effect of Petitioner's actions were to encourage Union membership. In fact, it was and is common knowledge in the industry that at all times relevant, this Union was a closed Union for all practical purposes and no act by Petitioner could possibly assist or encourage any of its employees to seek membership. In addition, the non-Union employees had already sought such membership and had been rejected because of the Union policy of not accepting new members except for the eldest legitimate male issue of members in certain cases. In view of the lack of substantial evidence or, indeed, of any evidence at all to support the allegation that Petitioner encouraged Union membership, the finding to that effect must be overruled.

There is ample authority directly on point. In *National Labor Relations Board* v. *Reliable Newspaper Delivery, Inc.* (C. C. A. 3, 1951), 187 F. 2d 547, the Third Circuit ruled upon the same problem with respect to the identical contracts and, to all intents and purposes, the identical parties, since *Reliable Newspaper Delivery, Inc.* belongs to the same association that negotiated this contract on behalf of *Reliable,* Petitioner, and all other members. That Court ruled that the situation was completely outside of the protection of the Act and that no unfair labor practice had been committed by the employer in that case. In addition, Congress itself has clearly manifested its intentions with regard to the issues involved herein. The Taft-Hartley

Act (Labor-Management Relations Act of 1947) amended the Wagner Act, which governs this matter,[2] so as to specifically cover the situation presented here, indicating its understanding that the situation in this case had been left open by that former Act (129 U. S. C. Sec. 158 (a) (3), 2d proviso). See *NLRB* v. *Reliable Newspaper Delivery, Inc., supra* at 552, fn. 8.

With respect to Section 8 (a) (1), it is clear from the Intermediate Report that no independent violation of that Section is charged; that report, adopted by the Board in its decision and order, charges Petitioner with the violation of Section 8 (a) (3) of the Act, "thereby" interfering with the rights of its employees in violation of Section 8 (a) (1) (R. 29). No other reference to that Section appears except as a coverall for specific unfair labor practices.

The Board's contention with respect to Section 8 (a) (2) is meaningless at this time. Petitioner signed its 1948 contract with the Union without the preliminary of a Union shop election; the Board concedes that Congress has since eliminated this requirement (Board's Brief in the C. C. A., p. 24). However, it insisted on voiding the entire contract in spite of separability and savings clauses. Nothing could possibly be gained by making the technical argument that a formal step, no longer required, was not complied with and, therefore, voids an entire contract. The only result would be to prevent Petitioner from bargaining with a Union with which it has had a long bargaining history and of whose representative status there has never been any

[2] The Wagner Act applies to all questions of discrimination in this case, since, although the benefits to Union members were paid after the effective date of the Taft-Hartley Act, they were based on a contract arising prior to such date and, therefore, fall within Section 102 of the Taft-Hartley Act, which refers the question of unfair labor practices arising out of the performance of such contracts to the language of the Wagner Act.

question. The opinion of the Circuit Court of Appeals modified the Board's Order to the extent that it permits the Petitioner and the Union to continue their relations under that contract, however the decree filed in the Circuit Court still orders the petitioner to cease giving any effect to its contract with the Union. (See R. 129 (1)(b).)

In addition, all of the charges are vulnerable to the Statute of Limitations contained in Section 10 (b) of the Act. The original charge in this matter was filed in February 1949 and merely dealt with the Petitioner's failure to pay Loner retroactive pay under the 1946 contract. The invalidity of the 1948 contract was not raised until an "amended charge" was filed in June 1950, nearly two years after the execution of the 1948 contract. The Board contends that the amended charge "relates back". The notion that an amended charge referring to the invalidity of a particular contract can "relate back" to an original charge, alleging completely separate unfair labor practices arising under a different contract, is illogical and circumvents the manifest intention of Congress as expressed in Section 10 (b) of the Act.

Although Loner was the only employee ever to file a charge in this case, the remedy of the Board extends to all other employees "similarly situated". Without further designation, the Board has thus employed a single charge, filed by a single employee, as the basis for issuing an Order, almost two years later, enlarging such charge to apply to unnamed employees, never identified either in the complaint or in the proceedings, who had not themselves raised any charge or indicated to Petitioner that they would make such charge. Such broad power is nowhere indicated in the Act from which the Board derives its authority. On the contrary, the Act makes the charge the specific procedural step by which the six months Stat-

ute of Limitations is, or is not, to be tolled (29 U. S. C. A. Sec. 160 (b)); the relatively short Statute of Limitations was enacted for the precise purpose of enabling employers to determine the extent of their potential financial responsibility and at as early a date as possible.

In addition, the conduct of a hearing by the Board, involving personal testimony of employees whom the Board neither identified nor called to testify, and who therefore were not available for cross examination, is a denial of due process.[3]

ARGUMENT.

I.

The Board has failed to prove that petitioner violated Section 8(a)(3) of the Act.

A. The Board's interpretation of Section 8(a)(3) is erroneous.

The basic error in the Board's approach to the interpretation of Section 8 (3)[4] is revealed in a simple comparison between the language of the statute and the language used by the Board, both in its decision and in its brief before the Circuit Court of Appeals. The statute, in relevant part, states as follows:

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[3] Petitioner has raised the issue that encouragement of Union membership under the peculiar circumstance of this matter could not have occurred. It, therefore, devolves to the Board to introduce "substantial evidence" or, indeed, any evidence at all that the acts complained of had the effect of encouraging Union membership. In addition, Petitioner would certainly have the right to cross examine complainants who were alleged to have been "encouraged" on the question of actual effect.

[4] The applicability of Section 8 (3) of the Wagner Act rather than 8(a)(3) of the Taft-Hartley Act, is discussed herein *supra*, fn. 2.

"SECTION 8: It shall be an unfair labor practice for any employer * * *

(3). *By* discrimination in regard to hire or tenure of employment or any term or condition of employment *to* encourage or discourage membership in any labor organization . . . " (Emphasis supplied.)

It is clear that the unfair labor practice defined in the statute is "to encourage or discourage membership in any labor organization". "Discrimination", on the other hand, is merely limiting the method by which the unfair labor practice occurs, rather than an independent unfair labor practice. This is emphasized, by reference to Section 8 (4) (29 U. S. C. A. 158 (4)), which makes it an unfair labor practice "to discriminate" in certain instances.[5] Thus, in Section 8 (4), discrimination is treated as an independent unfair labor practice; in Section 8 (3), it is not.

But the Board's analysis, as clearly revealed in its decision affirming the Intermediate Report of the Trial Examiner, insists that disparity alone along Union lines is sufficient grounds upon which to base the unfair labor practice of Section 8 (3). The Board's erroneous interpretation of the words of the statute is also emphasized by the incorrect paraphrase of the statute by counsel.

Note the elimination of the important qualifying word "by" before the word "discrimination" in the foregoing paraphrase. This clearly reflects a startling inability on

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[5] Sec. 8 "It shall be an unfair labor practice for an employer

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(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;"

"This Section prohibits 'discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization' " (Board's Brief in the C. C. A., p. 7).

the part of the Board to read the statute correctly. This curious phenomenon has been commented upon by several writers, among them Professor Chester C. Ward in his article, *"Discrimination Under the National Labor Relations Act"*, (1939) 48 Yale Law Journal 1152, as follows:

> "In each of subsections (1), (2), (4) and (5), the definition of the substantive unfair labor practice follows immediately the word 'to'; that is, the conduct which is made the basis of liability for violation of the Act is described after the word 'to' in four out of the five subsections. There is no reason to believe that that is not also true in the fifth case, that of subsection (3). The unfair labor practice under subsection (3), then—the basis of liability—is for an employer 'to encourage or discourage membership in a labor organization.' The words preceding 'to' in subsection (3) must be given effect, then, as a condition to liability, not as a basis of liability. In other words, 'discrimination' is the proscribed means of encouragement or discouragement of membership in a labor organization, but the prohibited conduct is the encouragement or discouragement of membership. . . . The reports of the Senate and House Committees make it clear that the proper short statement of subsection (3) is that it 'prohibits encouraging or discouraging membership in a labor organization by discrimination,' and not, as the Board put it, that it 'prohibits discrimination because of union activity.' But after only one year of administration of the Act, the Board abandoned its original interpretation of the statutory provision and introduced an idea of its own" (48 Yale L. J. 1152, 1156 (footnotes omitted)).

In the overwhelming majority of cases before the National Labor Relations Board, this distinction between "discrimination" and "encouragement and discourage-

ment of Union membership" has little, if any, significance. Nearly all cases involving Section 8 (a) (3) or 8 (3) arise out of a labor situation in which an employer is engaged in a fight with a particular labor organization and has chosen to weaken it either by direct tactics, such as discharge or similar discrimination against Union leaders and members, or by indirect tactics, such as favoring one labor organization over another. In cases such as these, there is no question that discrimination in favor of or against Union members is based upon an attempt to unfairly encourage or discourage Union membership, and that the effect of such action will necessarily lead to such encouragement or discouragement. As Professor Ward states:

> "Of course, no one would be fatuous enough to contend that discrimination, because of Union activities, will not constitute a violation of Section 8 (3) in, say, ninety-nine cases out of a hundred. But this is because such conduct by an employer ordinarily is purposed to discourage, and will also have the necessary effect of discouraging, membership in the Union concerned. This explains, perhaps, why the Board for so long had a perfect record in the Supreme Court in cases in which the Board has found a violation of Section 8 (3), and why the Supreme Court at first echoed the Board's language to the effect that Section 8 (3) forbids discharges because of Union activities. *The point of the actual language of the section has never been urged upon the Court, and the Court has no reason to presume that the Board, the body of experts charged with administration of the act, has been torturing the statutory language*". Ward, *supra*, at 1158 (Emphasis supplied).

In the case at bar, however, factors normally present in the application of Section 8 (3) are decidedly absent. No struggle for recognition on the part of the labor organi-

zation is involved; no so-called "concerted activities" are here interfered with; no bitter contest exists between two labor organizations, one of which is favored by the employer; the employer has nothing whatsoever to gain by the membership, or non-membership, of its non-Union employees in the bargaining Union. The non-Union employees, alleged to have been encouraged to join a labor organization, could not have entered the labor organization in question regardless of the employer's motive (R. 28, 105-106), and the labor organization clearly did not want them as is evidenced by its rules of admission which limit new members exclusively to the eldest legitimate son of a member in good standing more than 20 years. The employer's only interest in taking the action complained of was his normal and understandable desire to avoid making payments which he felt he was not legally obligated to make.

Thus, in this case, it does not follow that discrimination, based upon Union membership, is in any way connected with a desire on the part of the employer to defeat an existing Union by encouraging membership in another organization, nor that membership has actually been encouraged thereby.

B. The Board has failed to prove that petitioner discriminated against Loner within the meaning of the Act.

In *NLRB* v. *Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (1951), which involved the identical questions raised here, dealing with the identical collective bargaining contracts and with the identical situation with regard to non-Union employees, the Third Circuit found no "discrimination" within the meaning of the Act. In addition, the Court found no "encouragement of Union member-

ship" as required by the Act. As that Court cogently stated:

> "• • • the employer did not deprive its non-Union workers of anything to which they were entitled. They had been given their full wages during the period which later became subject to Union retroactive pay. There was never any arrangement with them then, or later, that they would receive further payments for that time should a new contract with an increased wage scale be agreed upon. If they had been members of the Union, they would have been within the contract and would have received the extra money. It was not the fault of the employer that they were unacceptable as Union members. The Union employees were so paid because that was the employer's contract obligation to them. • • • *Under all the facts, we fail to see the existence of discrimination." supra,* at page 551 (Italics supplied).

That case is identical in every substantive point to the one now under consideration. The collective bargaining agreement involved in the instant case was negotiated by the Suburban Wholesalers' Association, representing many news delivery companies engaged in the same type of work. Both *Reliable Newspaper Delivery, Inc.* and *Gaynor News Co., Inc.* are members of this Association and operated under exactly the same contract. They were both represented by present counsel. The same Union was involved and the same employment practices existed. The Third Circuit held in the *Reliable* case that that company was *not* guilty of discrimination within the meaning of the Act, for indulging in the very same practice for which the Second Circuit found *Gaynor News Co., Inc.* guilty of the unfair labor practice of discrimination to encourage Union membership. Petitioner was entitled to rely upon its collective bargaining contract as the basic arrangement between it

and its employees. Its non-Union employees, to whom the contract did not apply, except to provide that their employment was terminable at will (R. 98), retained a status common to the majority of employees everywhere. They lost nothing to which any rule of law, wage statute or individual contract entitled them. Having accepted the benefits of their employment with Petitioner and being aware from the start that their employment status was terminable at will (R. 108-109), these employees can hardly be said to have suffered the traditional oppression which Section 8 (a) (3) sought to relieve, to wit: coercive measures, such as discharges, demotions or other disciplinary action designed to inhibit their freedom of choice.

Certainly not all disparate treatment is "discrimination" under the Act, but only such disparate treatment as has the purpose and effect of bringing pressure to bear upon the free selection of a bargaining representative. *Associated Press* v. *NLRB*, 301 U. S. 103 (1937).

The type of benefit which the Board claims for these non-Union employees is in the nature of a very special concession; retroactive pay based upon the timing of a collective bargaining contract with that of an affiliated industry dealing with the same Union,[6] and vacation benefits based upon a continuing contractual relationship. The denial of such benefits to temporary personnel, who are not members of the bargaining Union, is not so unreasonable as to constitute unlawful discrimination. This Petitioner was under no duty to equalize all benefits paid to its its employees; neither the Wagner Act, nor the Labor-

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[6] Paragraph 19(a) of the 1946 contract (R. 99), used the July 17th date upon which retroactive pay was computed, because the Union's contract with the Publishers Association of New York, the affiliated industry upon which this Petitioner's contract with this Union is associated, expired on that date.

Management Relations Act, purport to be a fair labor standards act.[7]

The Board does not seriously attempt to distinguish the *Reliable* case, *supra,* except to say that a different proportion of Union and non-Union employees existed in that case. The Second Circuit adopted the Board's views based on that distinction, although it is not clear what the effect of such a distinction might be. Indeed, throughout the Intermediate Report, made by the Board's Trial Examiner and upon which the Board based its decision in this case, the facts of the *Reliable* case, *supra,* are relied upon as "strikingly similar" (R. 25), and authority for the ultimate findings of the Board in this case (R. 27-28). It was only upon the denial by the Third Circuit of enforcement of the Board's Order in that case that the Board has suddenly found it distinguishable in fact. In any case, no distinction in fact suggested by the Board or by the Second Circuit bears in any way upon the argument made here that no discrimination as required by the Act, namely, "to encourage or discourage Union membership", has been proved.

In another case which involved an interpretation of Section 8 (a) (3), the Circuit Court of Appeals for the Eighth Circuit had to deal with substantially similar questions to those involved herein. In that case, the Board had found the employer guilty of violating Section 8 (a) (3) in that he encouraged membership in one Union and discouraged it in another. The facts were as follows: the employer had a collective bargaining contract with the International

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[7] The Board's analysis is carried to its "dryly logical extreme" when benefits voluntarily conferred by this employer are considered. As a matter of good personnel relations with its permanent employees, this employer voluntarily credited them with an extra week of vacation pay. Is it to be penalized for this gesture by now being required to extend such payment to persons whom it did not contemplate in making its original offer?

Union of Operating Engineers, Hoisting and Portable, Local No. 101 of Greater Kansas City and Vicinity, A. F. of L. The National Union's charter provided for the issuance of sub-charters to local Unions for apprentice units and such a unit was formed at the site of one of the employer's construction projects. The apprentice unit was designated Local No. 101-B. The Union's seniority rule in effect at the time provided that, if an employee was a member of the apprentice unit for five years and qualified on the various types of equipment, he was then eligible for membership in the parent Union. However, in the event of lay-offs, all members of the parent Union were to have a preference to apprentices who must all be laid off before any member of the parent Union was discharged, regardless of the status of seniority on a particular project. The employer was compelled to reduce the size of his working force on a project and, therefore, according to the seniority rule, a member of the apprentice unit was discharged. This was made the basis for an unfair labor practice charge against the employer in that he was encouraging membership in Local No. 101 and discouraging membership in Local No. 101-B by his actions. The Court found that, under these circumstances, the employer was not guilty of violating Section 8 (a) (3). It stated at page 705, *supra*:

> "It must be borne in mind that he [the discharged employee] was not eligible to membership in Local 101 and he actively sought such membership prior to the instant here involved. In these circumstances we are unable to see how the discrimination against him as here charged encouraged membership in the respondent union or discouraged membership in Local 101-B. Picard [the discharged employee] could scarcely have been encouraged to become a journeyman member of respondent union become

> under no circumstances could be become such member. His status so far as union affiliations were concerned, was fixed and could not be changed, at least by an act of the respondent company. It could scarcely be said that one may effectively be encouraged to do or not to do that which he is incapable of doing." *N. L. R. B.* v. *Del E. Webb Construction Co. et al.* (C. C. A. 8, 1952), 196 F. 2d 702."

The Court then goes on to cite the *Reliable* case, *supra,* with approval.

In still another case involving similar questions regarding the interpretation of Section 8 (a) (3), the Court held that an employer cannot be found guilty of encouraging or discouraging Union membership, unless his acts were done for that purpose and that such acts had that effect. *National Labor Relations Board* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, etc., Local Union No. 41, A. F. of L.* (C. C. A. 8, 1952), 196 F. 2d 1 (1952), certiorari applied for and granted, No. 301, October Term 1952. In that case, the employer kept a seniority list from which men were assigned their work. One of the employees failed to pay his Union dues and, according to a By-Law in the Union Charter, thereby forfeited his standing on the seniority list. Accordingly, the Union requested the employer to reduce this man's seniority from eighteenth on the list to the bottom, or fifty-fourth position, as a result of which the employee lost work on several occasions and instituted this charge. The Court stated at page 3, *supra*:

> "The question confronting us, therefore, is whether there is substantial evidence to support the finding that such discrimination would, or did, 'encourage or discourage membership in any labor organization' in violation of Section 8 (a) (3) of

> the Act. *Discrimination alone is not sufficient.*" (Italics supplied.)

In the instant case, the Board seeks to charge this Petitioner with an unfair labor practice under Section 8 (3), now Section 8 (a) (3), for *discrimination alone.* The Second Circuit, in affirming the Board's ruling in the case at bar, made no finding that there was substantial evidence to support the claim that the discrimination involved herein would, or did, "encourage or discourage membership in any labor organization" in violation of Section 8 (a) (3) of the Act. The words of the statute itself certainly do not make mere discrimination alone a violation. The interpretation of the Third Circuit in the *Reliable* case and of the Eighth Circuit in the *Del E. Webb* case and the *Teamsters* case, *supra,* properly construed Section 8 (a) (3) to require more than mere discrimination to support a finding of an unfair labor practice under that section. All three cases indicate beyond any question of a doubt that *mere disparate treatment alone* is not sufficient to support an alleged violation of Section 8 (a) (3).

The Eighth Circuit continued its analysis in the *Teamsters* case, citing and following the *Reliable* case, *supra,* and concluded as follows:

> "Having considered the record as a whole, we can find no substantial evidence to support the conclusion that the discrimination in regard to the tenure or condition of employment of Boston [the employee] would, or did, encourage or discourage membership in any labor organization * * * ", *supra,* page 4.

The Court's analysis stated that theoretically discrimination can be a violation of Section 8 (a) (3) but only when there is *substantial evidence* to indicate that the act of dis-

crimination was done with the intention of encouraging or discouraging Union membership and that it would, or did have such effect. When neither purpose nor effect can be proven, disparate treatment alone is not a violation of Section 8 (a) (3) and certainly nothing more than disparate treatment has been shown in this case.

C. The Board failed to prove that petitioner encouraged Union membership within the meaning of the Act.

Petitioner is charged with encouraging membership in a labor organization to which is was, and is, fundamentally and bitterly opposed (R. 112-113) and which organization has indicated clearly that it would not accept such membership in any event (R. 105-109). It is accused of encouraging employees whose affiliation in the particular Union has never been of the least concern to Petitioner. As a matter of fact, it is clear from the circumstances of this case that such affiliation by any Union employee would have represented a financial loss to Petitioner since he would thereby have been brought under the contract.

It is Petitioner's contention that this anomaly is the result of an erroneous interpretation by the Board of Section 8 (3). As outlined in Paragraph A, *supra,* of this brief, the Board contends as a legal proposition that once it has proved disparate treatment as between the Union and non-Union employees, it has proved all that is required of Section 8 (3). But it is clear that the unfair labor practice defined in that section is "to encourage or discourage membership in any labor organization", and the words "by discrimination" are only qualifying words limiting the method by which encouragement or discouragement is achieved.

Of course, the distinction between "discrimination" and "encouragement and discouragement" is ordinarily of

slight significance, since encouragement or discouragement of Union membership may be assumed in the normal discrimination case. The phraseology of Section 8 (3) becomes decisive only in the unusual situation, such as is presented here, in which discrimination is concededly not identified with any attempt by the employer to influence or coerce his employees in their selection of a bargaining representative.[8]

Even the Second Circuit has recognized the distinction between discrimination alone and discrimination "to encourage or discourage Union membership". In *NLRB* v. *Child's Co. et al.* (C. C. A. 2, 1952), 195 F. 2d 617, that Court stated:

> ". . . the statute only prevents discrimination in regard to hire where the discrimination encourages or discourages membership in labor organizations. 29 U. S. C. A. Section 158 (a) (3)."

The requirements of proof become somewhat clearer when we shift the analytic emphasis to "encouragement or discouragement". The Board must prove that an employer intended to encourage or discourage union membership and that his action had that effect. In the normal case, these elements of purpose and effect run together in a single pattern of discriminatory activity in which the individual requirements of proof are obscured. In the unusual case, such as the one at hand, it is vital that they be precipitated out of the compound and separately applied.

The Board disputes that these requirements of proof exist independently, but this cannot be questioned in view

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[8] *NLRB* v. *Link Belt Co.*, 311 U. S. 584 (1941), cited by the Board (Board's Brief in the C. C. A., p. 11), makes the point that the "normal" case is to be distinguished from the "rare" case; that is precisely the point which Petitioner is attempting to establish here in the interpretation of Section 8(3).

of the almost unanimous concurrence of the Circuit Courts of Appeals. The following excerpts illustrate beyond any question of a doubt the necessity of sustaining the burden of proof that the discrimination alleged had both the purpose and the effect of encouraging or discouraging union membership.

> "SECTION 8 (3) requires that the discrimination in regard to tenure of employment have both the purpose and effect of discouraging union membership." *NLRB* v. *Air Associates,* (C. C. A. 2), 121 F. 2d 586, 592 (1941).
>
> "To make out a case under Section 8 (3), it must appear that an employer has by discrimination in regard to hire, etc., encouraged or discouraged membership in any labor organization. This requires proof of both the purpose and effect of the action under review." *Stonewall Cotton Mills* v. *NLRB,* (C. C. A. 5), 129 F. 2d 629, 632 (1942), cert. den. 317 U. S. 667 (1942).
>
> "It is perfectly clear that, in the discharge and refusal to reemploy, there was no intent to discourage membership in any labor organization, within the meaning of Section 8 (3) of the Act." *NLRB* v. *Draper Corp.* (C. C. A. 4), 145 F. 2d 199, 202 (1944).
>
> "Under this section of the Act [Section 8(3)] to constitute the unfair labor practice of discrimination, the discrimination in regard to hire and tenure must have the purpose 'to encourage or discourage membership in any labor organization'." *Western Cartridge Co.* v. *NLRB,* (C. C. A. 7), 139 F. 2d 855, 858 (1943).
>
> "The burden * * * was upon the Board to prove affirmatively and by substantial evidence that Bullard and Lingle were discharged because of union membership and activities and for the purpose of discouraging membership in the union." *NLRB* v. *Reynolds International Pen Co.,* (C. C. A. 7), 162 F. 2d 680, 690 (1947).

> "The prohibition of Section 8 (3), by its plain terms, extends to any discriminatory discharge the purpose and manifest effect of which is to discourage employee membership in a labor organization." *Wells, Inc.* v. *NLRB,* (C. C. A. 9), 162 F. 2d 457, 459-460 (1947).
>
> "It may be taken as settled that the right of an employer to discharge an employee, for cause or without cause, is the same whether the employee is or is not a member of the union. An employer may not, however, discharge or discriminate between employees, whether or not members of a union, for the purpose of discouraging membership in, or action on behalf of, a union." *NLRB* v. *Robbins Tire & Rubber Co.,* (C. C. A. 5), 161 F. 2d 798, 801 (1947).

It is therefore well settled that these requirements do exist and the question then becomes how each is to be applied to a particular situation and what type of evidence will satisfy such requirements and whether that evidence appears on the record.

1. The Necessity of Proving Purpose.

The Board contends that since Petitioner "discriminated against employees because they were not Union members" (Board's Brief in the C. C. A., p. 10), its intent to encourage membership is automatically established. Such a statement in this case, in the light of the unique circumstances involved, is somewhat flippant and misleading. Petitioner did not discriminate against Loner *because* he was not a Union member. Assuming that Petitioner did discriminate, it did so because, in its sound business judgment, it felt that Loner was not entitled to the particular benefits involved, either contractually or otherwise. That is quite different from the cases cited by the Board in their

brief before the Circuit Court of Appeals[9] in which the employer made a deliberate selection in favor of a particular Union which effectively bound his employees to become members of that Union or to lose their jobs. Union membership was the specific center of a controversy and the unilateral action on the part of the employer in those cases determined the membership of his employees. Here, Union membership, as such, is not even remotely involved.

Similarly, the Board's argument that such proof of intent goes merely to the question of whether or not discrimination occurred (Board's Brief in the C. C. A., p. 9), is completely inconsistent with the cases cited above in which the Courts specify that it is "intent to encourage or discourage Union membership" to which they refer. The notion that this is merely a method of establishing "good faith" on the part of an employer in mitigation of the remedy imposed against him (Board's Brief in the C. C. A., p. 10), is completely unsupported by the language of the Act. If the Act meant to provide for "good faith", it would have contained a good faith provision. Cf. Fair Labor Standards Act, 29 U. S. C. A. Section 216.

The Board, like any other litigant, is entitled to rely on objective facts to support an inference that a particular intent existed. But the presumption thus created is not an absolute irrefutable presumption. It exists only in the *absence* of evidence to the contrary. In this case, Petitioner attempted to introduce that evidence—that Loner's membership in the Union had been sought and rejected, and that, under the circumstance, the employer's action could not have intended to encourage a result which all parties knew to be impossible (R. 105-109, 117-120),

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[9] *NLRB* v. *Don Juan* (C. C. A. 2, 1950), 185 F. 2d 393; *NLRB* v. *Gluek Brewing Co.* (C. C. A. 8, 1944), 144 F. 2d 847; *Allis-Chalmers Mfg. Co.* v. *NLRB* (C. C. A. 7, 1947), 162 F. 2d 435.

but that evidence was rejected by the Trial Examiner. The Board's duty to come forward with the controverted evidence is apparent; in place of such evidence, it makes the suggestion, unsupported by any evidence whatsoever, that membership in the Union might be achieved "by any one of a number of steps, from bribery to legal action" (Board's Brief in the C. C. A., p. 23, fn. 23).

The purpose of the employer and the effect of his actions have been essential requirements of proof of Section 8 (3) violations from the very outset. The necessity of proving purpose was established by the Supreme Court in the very first case which came before it concerning the Act, *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 1937. In that case, the Court stated:

> "The employer may not, under cover of that right [to discharge for cause or according to his whim], intimidate or coerce its employees with respect to their self-organization, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation or coercion. *The true purpose is the object of investigation with full opportunity to show the facts.*" *Supra* at 45-6 (Italics supplied).

The rationale of requiring proof of motive is stated by Professor Cox in his article, *"Some Aspects of the Labor-Management Relations Act of 1947"*, 61 Harv. L. Rev. 1, 274, as follows:

> "The reason the employer's motive is decisive is plain. Imposed legal duties are usually a compromise between conflicting interests, the aggressor being privileged to invade the victim's interest to protect his own, so far as the law recognizes it. Hence, when the aggressor is not actuated by a desire

> to protect a recognized interest, the basis for his excuse disappears. This philosophy is embedded in Section 8 (3). If an employer discharges an employee to protect his interest in building up an efficient working force, he does not commit an unfair labor practice, even though the discharged employee is a Union leader and organization is thereby set back. On the other hand, if the employer's action springs from a desire to discourage organization, the privilege is lost and the discharge is unlawful."

In other words, an employer might, for business reasons, make a plant rule which differentiates between Union and non-Union employees (conceivably based on a Union apprentice training as in the *Del E. Webb* case, *supra*). The discriminatory rule, as applied, might possibly have the effect of encouraging or discouraging Union membership, but unless the employer's conduct is designed to encourage or discourage Union membership, no unfair labor practice is committed. Any other interpretation would place the employer in the position of having to defend every action which might, in some inadvertent way, have influenced Union membership, even though the conduct was not motivated by any Union considerations.

The unfair labor practice sections of the Act are, in a sense, penal sections; violation of the rules they establish may impose serious financial loss upon the employer and subject him to suffer serious restrictions in his future relationships with his employees. The imposition of such penalties should certainly require a showing of intent to violate the Act and to obtain a result prohibited by it. The words of the statute itself lend credence to this argument. On the evidence put forth in this case, it cannot seriously be said that Petitioner intended to encourage a result which it knew could not occur and which, if it ever did occur, would

not only have been a disadvantage to the employer, but would have also involved certain financial loss.

Finally, the cases cited by the Board for the proposition that the purpose of the employer is immaterial are not on point. *Republic Aviation Corp.* v. *NLRB,* 324 U. S. 793 (1945) does not deal with requirements of proof; it merely deals with the right of the Board to infer that such requirements have been proved in the absence of evidence to the contrary.[10] In his analysis of the *Republic Aviation* case, Professor Cox has stated:

> "In the Supreme Court, the company did not claim that it could make such non-discriminatory rules as it thought fit the conduct of its business; its argument was that the finding should be set aside because it was based on the Board's knowledge of industrial relations instead of on evidence in the record. The Court held, however, that under normal circumstances, the Board's conclusion was a permissible inference from the mere existence of the regulation and that, since the company had failed to take advantage of its opportunity to show that there were exceptional circumstances, the Board's order should be enforced." Cox, *Some Aspects of the National Labor Relations Act of 1947,* 61 Harv. L. Rev. 1, 41.

Herein lies a central issue in this case. The Board's findings are based on inferences drawn from objective facts. Such inferences may normally be made by any litigant.

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[10] In that case, a company rule, prohibiting solicitation of Union membership on company property, was declared by the Board to be an unfair labor practice and a discharge in consequence unfairly discriminatory. *Republic Aviation* has had a chequered career even in its properly limited sense. The Taft-Hartley Act purported to override it. (*Conf. Rep. H. R. 3020, 80th Cong., 1st Sess.*) and *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1950) and *NLRB* v. *Pittsburgh Steamship Co.,* 340 U. S. 498 (1950) strike at some of its basic procedural assumptions.

However, where concrete facts can be shown to refute these inferences, the Court has a duty to receive such evidence and weigh it against the inferences. In this case, Petitioner attempted to introduce such evidence (that Loner had sought membership in the Union and had been rejected; that Loner could not possibly become a member of the Union under its Charter as it existed at that time; that the employer stood to lose financially if Loner did join the Union, etc.) and these offers of evidence were rejected by the Trial Examiner as irrelevant and immaterial (R. 105-109, 117-120).

Thus, we have a decision unsupported by any substantial evidence in the record whatsoever, based on inferences alone, gleaned from a hearing in which the Trial Examiner prevented Petitioner from offering any evidence to rebut these inferences.

2. The Board failed to prove by substantial evidence on the record considered as a whole that the conduct complained of encouraged Union membership.

The scheme of the original Wagner Act was somewhat unique in that it invested the Board with the functions of prosecutor and judge. Protests against "shocking injustices"[11] and intimation of judicial abdication[12] stimulated pressure for Legislative relief from the administrative excesses of the Board. The legislative history of the Taft-Hartley Act indicates clearly that findings of fact by the Board must be supported by *substantial evidence on the record considered as a whole.* Originally, the bill as reported to the House, provided that "the findings of the Board as to the facts shall be conclusive unless it is made to appear to the satisfaction of the Court either (1) that the

[11] *Wilson & Co.* v. *NLRB* (C. C. A., 7) 126 F. 2d 114, 117.

[12] *NLRB* v. *Standard Oil Co.* (C. C. A., 2) 138 F. 2d 885, 887.

findings of fact are against the manifest weight of the evidence or (2) the findings of fact are not supported by substantial evidence." *H. R. 3020 80th Cong. 1st Sess.* Section 10 (4), reprinted in 1 Legislative History of the Labor-Management Relations Act of 1947, page 71. But, as the Senate Committee Report states, "it was finally decided to conform the statute to the corresponding section of the Administrative Procedure Act where the substantial evidence test prevails." *S. Rept. No. 105 80th Cong. 1st Sess.* 26-27, reprinted in 1 Legislative History of the Labor-Management Relations Act of 1947, pages 432-433. Certainly substantial evidence requires more than mere inferences which can be rebutted by concrete facts, especially where the Trial Examiner refuses to allow such facts to be offered in evidence. (R. 105-109).

This Court recently had occasion to inquire into the background of the substantial evidence doctrine as applied by Appellate Courts to Labor Board decisions, *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474. In that case, this Court stated

> "the substantiality of evidence must take into account whatever in the record fairly detracts from its weight" (*supra,* p. 488).

The Court continue its analysis of the requirements of substantial evidence as follows:

> "We conclude therefore that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps

> within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence, or both" (*supra*, p. 490).

In other words, the Board cannot substitute its alleged expertness in industrial relations as the basis for its findings, but must instead support its decision as any court must by substantial evidence *in the record.*[13] The record in this case is notable for its complete absence of evidence to support the allegation that Petitioner "encouraged" Union membership. Instead, the record merely discloses admittedly disparate treatment, from which objective fact the Board infers the conclusion that such disparity was motivated by a desire to "encourage" Union membership, in spite of the concrete facts offered to rebut the inferences to the effect that "encouragement" was impossible; that the employer would suffer immediate financial loss if his non-Union employees became members of the Union; the employer's long background of at arms relations with the Union; the complaining employee's prior application for membership in the Union which was rejected; the Union's rules of admission which rendered the complaining employee ineligible for membership in the Union, etc.

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[13] In this same vein, see *NLRB* v. *Pittsburgh Steamship Co.*, 340 U. S. 498 (1950).

Thus far, we have shown the employer's complete lack of any motive for encouraging Union membership. We have also indicated the practical impossibility of achieving the prohibited end result of such encouragement due to the Union's restricted membership rules. We look now to the requirement established in prior cases and inherent in the language of the statute itself that the conduct complained of has the prohibited result of actually encouraging Union membership.

3. The Necessity of Proving Effect.

To state that Section 8 (a) (3), or its predecessor, 8 (3), do not require independent proof that encouragement of Union membership actually occurred, is to state that a statute describing "X" as a crime does not require that the occurrence of "X" be proved. Nevertheless, the Board contends that so long as a "necessary tendency" toward encouragement may be inferred, a violation of the Act has occurred although encouragement, as such, may not have occurred.

Again, as with the case of intent above, the Board is speaking the language of evidence, not of statutory interpretation. It may be true that where a "necessary tendency" may be inferred from the underlying facts, the Board is entitled, in the absence of evidence to the contrary, to make an ultimate finding without the necessity of actually proving that a certain person or persons were actually encouraged. See *NLRB* v. *Engelhorn & Sons* (C. C. A. 3, 1943), 134 Fed. 2d, 553, 557. But where it can be shown that, under all the circumstances, encouragement of Union membership is a logical absurdity, all of the "necessary tendency" and "natural and probable effect" (R. 29) in the world cannot suffice to establish such encouragement

as a finding of fact. As the Court in the *Reliable* case, *supra*, stated:

> "It would be necessary for us to completely close our eyes to the admitted facts in order to accept the Board's statement that the inevitable effect of the back wage payment was to encourage union membership because we know that membership in the union for non-union workmen was a practical impossibility" *Id.*, at page 552.

This situation may be compared with a similar one presented to the Second Circuit in *N. L. R. B.* v. *Air Associates* (C. C. A. 2, 1941), 120 Fed. 2d, 586. In that case an employer was charged with discriminately discharging two employees who were not union members. The Board argued that such discharges were made in order to create resentment against the union. The Court stated that it was impossible to infer from this alone that the discouragement of union membership had occurred; The Court stated:

> "But we can discover no satisfactory explanation by the Board which would permit either a finding that the unlawful purpose had the effect required by the act or findings from which such an effect might reasonably be inferred." *supra*, at page 592.

The Second Circuit later referred to the Board's finding in *Air Associates* as creating a legal absurdity in *Perkins* v. *Endicott-Johnson Corporation* (C. C. A. 2, 1941), 128 Fed. 2d, 208 at pages 221-2, as follows:

> " * * * there was no evidence and no finding from which an inference could possibly be drawn that the discharge of employees (not known by the employer to be union members) in order to reinstate union employees, previously discharged, could conceivably discourage membership in a union, in violation of Sec-

> tion 8 (3) of the National Labor Relations Act, 29 U. S. C. A., Section 158 (3)."

In the past the Courts have consistently sought to analyze the actual effect an employer's action may have upon union membership. Thus in *Quaker City Oil Refining Corporation* v. *NLRB,* 119 Fed. 2d, 631 (1941), the Court stated as follows:

> "It is quite clear that all of these conversations took place casually in the course of conversations between the individuals concerned. There is no evidence that they had the slightest effect in actually preventing or discouraging membership in the union." *supra,* at page 633.

This language was approved and applied in *N. L. R. B.* v. *Public Service Transport,* 177 F. 2d 119 (1949).

Petitioner offered to prove that Loner had applied for union membership long before the question of retroactive pay arose, had been unsuccessful in achieving that goal and was, in fact, ineligible for such membership (R. 105-109, 117-120). Assuming this to be true, the Board is in the position of accusing Petitioner of encouragement, where no encouragement was necessary and of encouraging a result which, upon the offered evidence, was impossible of achievement. To find the unfair labor practice of encouragement under such circumstances would be a complete *non sequitur.*

II.

Legislative History.

The legislative history of the Labor Management Relations Act of 1947 adds weight to the interpretation for which Petitioner contends. We are dealing in this case with the

National Labor Relations Act of 1935, an Act notoriously unsolicitous of the rights of non-Union employees. See *Colgate-Palmolive-Peet Co.* v. *NLRB,* 338 U. S. 355 (1949); *Congressional Record,* 80th Cong., First Sess., 93 Cong. Rec. 3471 to 3475; 93 Cong. Rec. 3950, *et. seq.* The Labor Management Relations Act of 1947 had as one of its main objectives the protection of such employees (see Sections 8(a)(3); 8(b)(2); 7; see also *Report of Senate Committee on Labor and Public Welfare.* Sen. Rep. No. 105, 80th Cong., First Sess. (1947), pages 6-7) and among its amendments was a provision to cover the precise situation existing in the case at bar. In Section 8(a)(3) of that Act, Congress provided as follows:

> "* * * no employer shall justify any discrimination against an employee for non-membership in a labor organization (a) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (b) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership."

Surely if the reading of the National Labor Relations Act of 1935, for which the Board here contends, were correct, then the new provision would have been entirely unnecessary because discrimination in favor of union members where membership in the union was closed would have been *per se* an unfair labor practice under the former Act. It is difficult to believe that such an extensive change could have been merely declaratory of existing law and it impels one to the conclusion that the National Labor Relations Act of 1935 left open the situation here complained of.

III.

An illegal Union security clause does not void an entire contract which also contains savings and separability clauses.

The Order which the Board sought to enforce in this case originally required the Union and Petitioner to discontinue all relations between them and desist from performing or giving effect to the contract formally executed by the parties on October 25, 1948. The Second Circuit modified that Order in so far as it forbade any contractual relations between the parties but nevertheless permitted a provision to be entered ordering Petitioner to:

"1. Cease and desist from:

* * * * * *

(b) Performing or giving effect to its contract of October 25, 1948, with Newspaper and Mail Deliverers' Union of New York and Vicinity;

(c) Entering into, renewing, or enforcing any agreement with Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization, which requires its employees to join, or maintain their membership in, such labor organization as a condition of employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended." (R. 129-130).

The Board had held the 1948 contract void on the grounds that it contained an illegal union security clause without having fulfilled the preliminary technical requirement of holding an election as formally required under Section 8 (a) (2). Thus, the failure of Petitioner and the Union to observe a procedure so perfunctory that even its

former proponents have since advocated its elimination from the Act[14] has resulted in the parties being deprived of all rights they had acquired under that contract. The so-called Union shop election, concededly omitted by Petitioner and the Union in reaching their 1948 contract, was done away with in October 1951 as expensive, cumbersome and meaningless and a new procedure substituted which is not relevant here.

Nevertheless, the Board insists upon the technical applicability of Section 8 (a) (2), a section designed to reach domination of and connivance with labor organizations by an employer seeking to bore from within, a situation not even remotely involved in this case.

The contract in question was precisely the same contract which this Court had occasioned to analyze in its recent decision in *NLRB* v. *Rockaway News Supply Co., Inc.*, No. 318, October Term, 1952, decided March 9, 1953. That contract was negotiated by the same Union and the same Newsdealers Association as were involved in the *Rockaway News Supply* case, *supra*. The parties were represented by the same counsel. The contract contained the same savings and separability clauses. Those clauses read as follows:

> "To the best knowledge and belief of the parties, this contract now contains no provision which is contrary to Federal or State law or regulation. Should, however, any provision of this agreement, at any time during its life, be in conflict with Federal or State law or regulation, then such provision shall continue in effect only to the extent permitted. In the event of any provision of this agreement thus being held inoperative, the remaining provi-

[14] 82d. Cong., 1st Sess. Sen. Rep. No. 646; House Rep. No. 182; P. P. L. 189.

sions of this agreement shall, nevertheless, remain in full force and effect." (R. 93).

As this Court so cogently stated in the *Rockaway News Supply* case, *supra,* at pages 6-8:

> "The second hurdle in the way of the Board's position [in attempting to void the entire contract because of the illegal union security clause] is that it ignores the saving and separability clauses of the contract itself • • • The features to which the Board rightfully objects, not only may be severed, but are separated in the contract. The whole contract shows respect for the law and not defiance of it. The parties, who could not foresee how some of the provisions of the statute would be interpreted, proposed to go as far toward union security as they are allowed to go, and this is their right; • • •
>
> "The total obliteration of this contract is not in obedience to any command of the statute. It is contrary to common law contract doctrine. It rests upon no decision of this or any other controlling judicial authority. We see no sound public policy served by it • • • The employment contract should not be taken out of the hands of the parties themselves merely because they have misunderstood the legal limits of their bargain where the excess may be severed and separately condemned as it can here."

Exactly the same facts, the same considerations and the same contract are involved in this case and Petitioner submits that that portion of the Order of the Court of Appeals for the Second Circuit, which orders Petitioner to cease and desist from performing or giving effect to its contract with the Union, should be overruled.

IV.

The Board's order is not entitled to enforcement as to employees who are not named in the complaint and who did not file charges before the statute of limitation expired.

Only one of the employees filed a charge against Petitioner. Nevertheless, Petitioner found itself, nearly two years later, faced with a complaint extending that charge to include, without further designation, all of Petitioner's non-Union employees. Petitioner contends that this is not authorized by the Act. The Board blandly asks why Petitioner should complain of the inclusion of all non-Union employees when such inclusion occasioned no "hardship" or "surprise" to it. In the first place, Petitioner has the right of any person or corporation to be required to defend only those charges which are actually brought against it. Nothing in the Act empowers the Board to solicit litigation on the part of individuals who, for whatever reason, have not themselves instituted proceedings, nor may the Board commence proceedings on its own initiative. *Consumers Power Co.* v. *NLRB* (C. C. A., 6, 1940), 113 F. 2d. 38. See also *NLRB* v. *Local 57, International Union of Operating Engineers, et al.* (C. C. A., 1), decided February 3, 1953, reported in C. C. H. 22 Labor Cases ¶67, 384. In that case, an unfair labor practice charge was filed by an employee against a Union. The Board made its findings and held both the Union and the employer guilty of unfair labor practices despite the fact that the complaining employee had never named the employer in the charge. The Court stated:

> "• • • *The Board lacks initiatory power under the Act.* Section 10(c) provides that an unfair labor practice may be found and an Order may be issued only against 'any person named in the complaint'. See *Gen. Elec. X-ray Corp.*, 76 NLRB 64 (1948). Section 10(b) allows a complaint to be issued only against a person charged with an unfair labor practice. Thus, under this statutory scheme, the choice of respondent or respondents lies with the person aggrieved and an employee who is illegally discriminated against by joint action of the Union and the employer may name as respondent either the Union or the employer or both. It seems to us that the Board lacks statutory authority to add an employer as a respondent where a charge like this is made against the Union and its officers." (Emphasis supplied).[15]

Similarly, it would seem that the Board has no authority to initiate charges on behalf of unnamed persons who have not themselves seen fit to file such charges. Although the Board may enlarge upon unfair labor practices set out in the original charge, that is quite different from what the Board attempts to do here in actually initiating charges on behalf of employees who did not themselves either institute them, or indicate on the Record that they wished such charges brought in their behalf. In the second place, a class suit

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[15] See *Marine Engineers' Beneficial Association, No. 13* v. *NLRB, International Longshoremen's Association, A. F. of L., et al.* (C. C. A. 3, 1953) reported at C. C. H. 23 Labor Cases ¶67, 447, which holds that the Board also lacks the power of withdrawal. In that case, the Board entered into a settlement with the Respondents over the objection of the charging party. The Third Circuit held that the charging party's rights may not be cut off without at least providing them with an opportunity for presenting evidence at a hearing. Certainly, if the charging party is entitled to protection under those circumstances, then, in the circumstances of the instant case, Petitioner should also be entitled to the protection afforded by cross-examination of the charging parties.

of the type which the Board has apparently spun here is a particularized form of action which, if it were to be part of the Board's arsenal, should have been specifically authorized by Congress. (See Federal Rules of Civil Procedure, Section 23.)

Congress indicated its intention to enable employers, after a six month period, to draw the line against potential liability greater than that indicated by the charges as filed and mailed to them. A procedure by which a single charge filed by a single employee might serve as a bridge for countless other claims filed two or three years later would, in a vital respect, undermine Congressional intention in this regard and completely vitiate the purpose of Section 10(b). Finally, the nature of the testimony, which Petitioner sought to adduce and which the Third Circuit treated as highly relevant in the *Reliable* case, *supra,* was personal testimony of a sort which would certainly differ as between various non-Union employees. Petitioner, having raised the issue that, under the circumstances of this case, Union membership was and is an illusory factor, the testimony of each such claimant is required. The burden was not Petitioner's; the Board's presumption that Petitioner's acts "tended to" encourage union membership having been met, the burden was upon the Board to come forward with substantiating evidence. This is precisely what the Board attempts to do by unsupported inferences when its states in its brief that "frustrated applicants" for Union membership "might seek to break down membership barriers by any one of a number of steps ranging from bribery to legal action" (Board's Brief in the C. C. A., p. 23, fn. 23). Surely such proof, if it existed, would bring into controversy the testimony of many employees, which testimony Petitioner would have the right to cross examine. Thus, it is not true

that the situation of all employees is "identical to that of the employee who filed the charge" and the failure on the part of the Board to define, name or produce those employees renders its Order unenforceable as to them.

Conclusion.

For the reasons stated, the judgment of the Court below should be reversed and the Order of the Board denied enforcement.

Respectfully submitted,

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April 1953.

Appendix.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V, 151, *et seq.*), are as follows:

Rights of Employees.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices.

Sec. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a con-

dition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

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(b) It shall be an unfair labor practice for a labor organization or its agents—

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(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic

dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * *

Sec. 10 (b). Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).